Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Consumer Protection	)	WC Docket No. 05-271
In the Broadband Era	)	

Notice of Proposed Rulemaking

REPLY COMMENTS OF AARP

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Table of Contents

Page No.

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AARP[1] respectfully submits these Reply Comments for the FCC's consideration and thanks the Commission for the opportunity to participate in this important docket regarding consumer protections in the broadband era. These Reply Comments will respond to suggestions made by parties that filed Comments. In addition, these Reply Comments will explicate the recommendations AARP made in its Comments in light of the positions announced by other parties in their comments in response to the *Notice*[2].

I. Introduction and Summary

In the comments that follow, AARP offers the following findings and recommendations for the Commission's consideration:

A. General Findings and Recommendations

- Consumers have an expectation of fair dealing and privacy when purchasing broadband Internet access services, as they do with telecommunications services. The Commission has the authority and the obligation to ensure that this expectation matches reality by extending certain consumer protections to broadband service.

- In today's broadband marketplace, the claim that "competitive markets will provide" is more nearly an aspiration than a reality. In this regard, the recommendation to "do-nothing" or "do-almost-nothing" by some commenters (Comcast, Cingular , Verizon, USTA, Time-Warner, BellSouth, etc.) should be rejected in favor of a policy that will help consumers avoid the abuses (slamming, cramming, misrepresentations, poor quality, overcharges, service disputes, misleading bills, and unfair contracts) that unfortunately accompanied other major transitions in the telecommunications industry.

[1]**AARP** is a nonprofit, nonpartisan membership organization that helps people 50+ have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. We have staffed offices in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.
[2] *Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking, WC Docket No. 05-271, FCC 05-150 (rel. Sept. 23, 2005) (*Order*) (NPRM or *Notice*).

- In addition to the specific consumer protections identified by the Commission in the NPRM, the Commission must act to ensure that consumers have access to the full scope of the Internet without interference by their broadband access provider.

- The Commission should work closely with state regulators to implement and enforce consumer protections for broadband service. The Commission should implement the "functional" approach to state-federal cooperation endorsed by NARUC. Finally, the Commission should not preempt state regulators from making and enforcing their own consumer protection rules.

B. Specific Findings and Recommendations

- **Truth-in-Billing –** For the broadband services market to become and remain fully competitive, consumers must have meaningful and high-quality information about the prices and terms of service, stated in clear and unambiguous language. For the same reasons the Commission found it necessary to adopt its "Truth-in-Billing" rules for narrowband services, it should, at a minimum, extend those rules to broadband providers. The Commission is ill-served by industry calls to wait until problems develop before adopting such rules.

  In addition, the Commission should issue rules governing the content and disclosure requirements for contracts for service and address the practice of providers locking consumers into contracts with severe penalties for termination. Commission actions in these areas will enhance competition and avoid the serious consumer problems that accompanied relaxation of regulation in telecommunications services.

- **Slamming and Cramming –** These are two of the most vexing problems that afflicted the introduction of competition in long distance and local telecommunications markets. Over the past fifteen years, the Commission and state regulators have developed important measures to deal with the problems of slamming and cramming. The Commission should apply those lessons immediately to the broadband market and not let such abuses become a serious problem for consumers in this market. Further, the Commission should work to improve its rules and enforcement against deceptive marketing and billing practices.

- **CPNI Protections –** The personal information that broadband providers collect and store is even more sensitive than data collected by telecommunications carriers. In addition to descriptive identity-related and credit-related information, broadband providers have the ability to collect and maintain detailed information about the customer's use of the Internet. This includes the names of the websites visited and files downloaded. ISPs can even maintain the *content* of email messages sent or received by its customers.

AARP is concerned that many Americans do not understand the extent to which Internet Service Providers today collect and store information about their Internet usage. The Commission should restrict the use of this information and permit its use by service providers only with the explicit permission (opt-in authority) of the consumer.

Given the extreme sensitivity of this information and the potential of its being stolen or lost (let alone sold or purposely released), the Commission should require broadband service providers to destroy such sensitive information within a reasonable time frame.

II. Commission Authority and Obligation to Adopt Consumer Protections for Broadband Service

In its *Notice*, the Commission asserts that it has authority under Title I of the Communications Act to extend consumer protections to broadband service. AARP agrees. In ¶ 109 of the *Order*, the Commission discusses the standards applicable to the exercise of its Title I jurisdiction:

> The Commission may exercise its ancillary jurisdiction when Title I of the Act gives the Commission subject matter jurisdiction over the service to be regulated and the assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] various responsibilities." We recognize that both of the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers. [Footnotes omitted].

Most industry commenters questioned the Commission's authority to extend Title II-type regulations to broadband services. However, no party persuasively challenged the Commission's authority to extend consumer protections to broadband services. Some commenters[3] noted the limited nature of the Commission's authority by relying on two recent court decisions limiting the Commission's Title I authority: *American Library Association*[4] and *Motion Picture Association of America*[5]. However, these cases are easily distinguishable from the present issue. In *Motion Picture Association of America,* the United States Court of Appeals for the District of Columbia Circuit held that the Commission lacked statutory authority for its regulations requiring video descriptions and could not rely on ancillary jurisdiction where program content would be implicated. In *American Library Association*, the same court found that the Commission lacked authority to order the adoption of broadcast flag technology because it could not regulate consumer electronic devices *after* they have received a complete wire or radio transmission. Neither case suggests that the Commission lacks authority to extend consumer protections to broadband service.

The two-pronged standard quoted above from ¶ 109 of the *Order* that governs the exercise of the Commission's ancillary jurisdiction derives from the *Southwestern Cable* decision[6]. As to the first prong, the Commission's "subject matter jurisdiction" over the subject services is clear. The services are "communication by wire or radio" that the Commission has determined to be interstate in character. As to the second prong, the consumer protections identified in the Order are "reasonably ancillary" to the Commission's responsibilities under the Communications Act.

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[3] See, for example, the Initial Comments of Cingular at p. 3, Comcast at pp. 9-11 and TimeWarner at pp. 5-6.
[4] *American Library Ass'n v. FCC*, 406 F.3d 705 (D.C. Cir. 2005)
[5] *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 798-99 (D.C. Cir. 2002)
[6] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)

Although the Commission removed the subject services from Title II regulation by finding that they are "information services," many of these broadband offerings are in fact substitutes for services still provided under Title II. Indeed, the Commission identified this trend toward substitution in the NPRM when discussing the requirements of section 254(g) requiring rate averaging for certain services.[7] Since the Commission can lawfully apply consumer protections to Title II services, the Commission's jurisdiction is "reasonably ancillary" to its responsibilities under the Communications Act when it applies the same protections to services that are substitutes for some of those same Title II services.

Commissioner Adelstein, in his concurrence in the *Order*, noted that:

> As we move to this less-regulated framework, I'm pleased that we take up the Supreme Court's invitation to use our Title I ancillary jurisdiction to address critical policy issues.[8]

Commissioner Copps made a similar point in his concurrence, as did Commissioner Abernathy.[9]

In its *Brand X* decision, the Supreme Court discussed the Commission's ability to use its Title I authority to address any concerns that might arise as a result of removing cable modem services from common carrier regulation:

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[7] "…[W]e ask whether we should exercise our Title I authority to impose any similar requirements on providers of broadband Internet access services, <u>particularly as consumers substitute broadband services and applications for narrowband services</u> that were covered by section 254(g). Order, para. 157. (emphasis added)

[8] *Order*, "Statement Of Commissioner Jonathan S. Adelstein Concurring In FCC 05-150, Approving In FCC 05-153" at p. 130.

[9] *Order*, *Copps Concurrence* at p. 129 and "Statement of Commissioner Kathleen Q. Abernathy" at p. 125.

> Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications… (Emphasis added) [10]

The Court even pointed the way for this ancillary authority to reach non-facilities-based information service providers:

> In sum, if the Act fails unambiguously to classify non-facilities-based information-service providers that use telecommunications inputs to provide an information service as "offer[ors]" of "telecommunications," then it also fails unambiguously to classify facilities-based information-service providers as telecommunications-service offerors; the relevant definitions do not distinguish facilities-based and non-facilities-based carriers. That silence suggests, instead, that the Commission has the discretion to fill the consequent statutory gap.[11]

The Commission has an *obligation* to use this authority to adopt protections for consumers of broadband services. In the Communications Act, Congress charged the Commission with regulating "interstate and foreign commerce by wire and radio so as to make available . . . to all the people of the United States, without discrimination . . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[12] Consistent with this mission and authority, the Commission and state regulators must enforce fair dealing and privacy protections in the broadband market. Only by extending consumer protections comparable to those that the Commission applies to Title II services will the Commission fulfill its obligation to serve the public interest in the broadband market.

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[10] *NCTA v. Brand X,* at pp. 3-4.
[11] *Id*., at p. 25.
[12] 47 U.S.C. § 151 (2000)

III. Consumer Protection in a Competitive Marketplace

Many industry commenters argue that there is no need for the Commission to extend consumer protections to broadband services because the market for broadband services is competitive.[13] These commenters simply assume that a competitive marketplace will produce the "correct" level of consumer privacy and consumer protection without regulatory oversight. AARP disagrees.

AARP concurs with the goal of Congress and the Commission to promote broadband service by encouraging competition. Economics teaches that market pressures and market opportunities will provide incentives to providers to become efficient and provide innovative products to customers. However, competition does not guarantee that the industry will voluntarily engage in business practices that protect consumers. An unregulated broadband market, even one that is fully competitive – and AARP disagrees with assertions that the broadband marketplace is fully competitive today[14] – will not automatically produce the levels of privacy and consumer protection that consumers want and deserve. This is why the Commission retains jurisdiction over these services even after significantly reducing regulatory obligations as it has done in the *Order*.

Depending on the future progress of technology, the broadband marketplace will have the opportunity to offer broadband service from multiple providers over multiple technical platforms. At the present time, of course, the overwhelming majority of consumers have

[13] See, for example, the Comments of BellSouth at p. 6, Comcast at p. 9 and CTIA at p. 9.
[14] Without first identifying the parameters of competition and quantifiable standards for ideal market performance, an accurate evaluation of the effectiveness of the current regulatory approach is impossible. In this regard, AARP urges the Commission to establish a clear definition of effective competition in the market for broadband services.

only one or two options for broadband Internet access: cable-based and/or DSL-based service. Broadband over power lines, fiber optic lines, or comparable delivery by satellite and other wireless broadband solutions are promised, but not yet delivered. The following table shows the near-negligible percentages contributed by technologies other than DSL and cable to broadband access at the end of 2004.

Broadband Technologies - Dec 2004		
ADSL	13,817,280	36.5%
Other Wireline	1,468,566	3.9%
Coaxial Cable	21,357,400	56.4%
Fiber or Powerline	697,779	1.8%
Satellite or Wireless	549,621	1.5%
Total Lines	37,890,646	100%

Source: FCC *High-Speed Services, July 2005 Report*, at 2, Table 1

In their Initial Comments, several industry commenters argue that the consumer protections described by the Commission in the *Notice* will interfere with or impede the development of broadband services and competition in the broadband marketplace.[15] AARP disagrees strongly with that analysis for three reasons.

First, the success of a competitive market depends on consumers having adequate information and the ability to make informed choices. For example, providers must: (1) provide consumers with clear and adequate disclosures that will enable them to understand the prices and terms of service offered by competing providers; (2) not trick

[15] *See*, e.g., Comments of Time Warner at p. 5, Comments of OPASTCO at p. 4 and Comments of Verizon at p. 5.

customers to change providers unwittingly; (3) not load onto the monthly bill misleading and unsought services and features; and (4) not mislead consumers into signing contracts for service with onerous termination fees. Rather than impede the development of competition, strong consumer protection rules imposed on all providers in non-discriminatory fashion will enhance the development of a fully competitive marketplace.

This is not, of course, a theoretical discussion – as the Commission and every consumer knows. The consumer benefits of competition in the long-distance market were accompanied by significant consumer problems. Lower prices in that market were accompanied by substantial confusion and consumer frustration. The culprits were slamming, slick and misleading advertising, and finger-pointing among carriers when customers tried to resolve billing problems. The Commission should also recall that, even before these problems were manifested in the long-distance market, there was rampant consumer abuse in the payphone and operator services industry when those industries were restructured and partially deregulated. At the present time, many consumers are being penalized by wireless carriers with mandatory contracts for wireless service with costly early termination fees.

By restricting information needed by consumers to make informed choices, each of these anti-consumer practices makes a market *less* competitive. AARP believes that rules governing carriers' behavior will help ensure that carriers compete on price, features and quality of service. Carriers should not be rewarded for hiding important information from consumers. In sum, AARP believes that the timely and judicious intervention by the Commission as posited in this *Notice* is necessary to secure the benefits of competition for consumers in the broadband marketplace without exposing them to the problems of the past.

Second, in answer to industry commenters, AARP is convinced that the Commission can construct consumer protection rules in a way that does not intrude on the development of the competitive marketplace. We agree with NASUCA's point here:

> The Commission should not accept at face value claims that the application of consumer protections represents a burden on broadband service providers that outweighs these fundamental protections for consumers. Nor should the Commission assume these consumer protections are an impediment to the Commission's obligations under Section 706 of the Act to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[16] (Footnote omitted)

As AARP will outline below, some consumer protections may require modification as they are imported from services regulated under Title II and applied to information services. As long as the protections remain effective, AARP supports streamlining them to minimize any anti-competitive effects alleged by the industry.

Third, this debate exposes a fundamental divergence in opinion as to what the competitive marketplace of the future should look like. At a time when identity theft and consumer profiling are prevalent, AARP believes it makes no sense to exempt a major segment of the telecommunications industry from rules that govern the handling of sensitive personal information.

[16] Comments of NASUCA at p. 6.

Actual competitive markets are not synonymous with the textbook ideal of perfectly competitive and completely deregulated markets. One is challenged to name an industry that is free of regulation and of mandated consumer protections, even when the industry is reasonably competitive. Consider, for example, the requirement that lending institutions compute and publish an Annual Percentage Rate (APR) for any consumer loans the institutions make. This requirement of the Truth in Lending Act offers a direct parallel to a "truth-in-billing" requirement of this Commission: service providers must render bills in formats that will permit consumers to make informed comparisons among competing providers.

In sum, a competitive market still requires action by regulators to ensure that consumers can take advantage of competition while enjoying protections from industry-wide practices that can harm their interest. In the next section we discuss the details of some of these protections, including the requirements that providers render accurate and readable monthly bills and make contract terms transparent and equitable. These are two aspects of the important Truth-in-Billing protections that the Commission should extend to broadband service.

IV. Specific Consumer Protections

A. Truth-in-Billing

In the NPRM the Commission seeks comment on whether it should exercise its Title I authority to impose requirements on broadband Internet access service providers that are similar to the Commission's Truth-in-Billing requirements or otherwise geared toward reducing telecommunications-related fraud. AARP believes strongly that the Commission must extend these truth-in-billing and disclosure protections to broadband providers. In fact, we think such protections are *essential* for customer choice and competition to grow in the broadband marketplace. It is obvious that consumers cannot knowledgably choose between competing broadband providers if the format and content of monthly bills are incomprehensible, making bills of competitors impossible to compare.

The record in the Commission's *Truth-in-Billing* docket[17] is brimming with consumer complaints about confusing and misleading telecommunications bills. AARP sees no reason why these same complaints won't show up in the broadband marketplace as consumers substitute broadband services for narrowband services. Unless the Commission acts now to head off consumer problems with VoIP service and broadband services generally, we feel certain the same consumer dissatisfaction will appear in the broadband marketplace. In fact, since much of the terminology and concepts for broadband service will be new to most consumers, we think some of the problems may be even worse.

Here is a brief listing of some of the main Truth-in-Billing-related problems encountered by consumers of both wireless and wireline service:

- Confusing and misleading monthly bills

[17] *In the Matter of Truth-in-Billing and Billing Format,* CC Docket No. 98-170 and *In the Matter of National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing,* and CC Docket No. 04-208 (*Truth-in-Billing*)

- Multiple confusing "line-item" charges
- Inconsistent descriptions of services and fees
- Misrepresentation of mandated fees
- Mislabeling business cost as regulatory costs
- Duplicate billing
- Unresponsive customer service organizations
- Misleading contract terms
- Exorbitant penalties for early contract termination

In brief, AARP believes that the Commission should require that bills for broadband service contain accurate, clear and meaningful descriptions of all listed charges. The bills should clearly identify the service provider (with contact information) responsible for each component of the bill. The Commission should also require broadband providers to include clearly stated terms and conditions on all bills, marketing literature and other relevant communications. Finally, the Commission should back up these requirements with swift and sure penalties for non-compliance.

The Commission's Truth-in-Billing rules are currently being reviewed in Docket No. CC 98-170 and Docket No. CC 04-208. Together with several other consumer organizations, AARP has stressed in comments in these dockets that the Commission's rules need to be strengthened in several ways.[18] One important issue in creating understandable and non-misleading consumer bills is the degree to which carriers are permitted to include "line item" charges on the bill and the way in which those line item charges are described. Rather than repeat those comments here, AARP asserts that the concerns expressed in the *Truth-in-Billing* docket apply equally to providers of

[18] *Truth-in-Billing,* "Initial Comments Of AARP, Asian Law Caucus, Consumers Union, Disability Rights Advocates, National Association of State PIRGs, and National Consumer Law Center." (filed June 24, 2005)

broadband service and respectfully asks the Commission to consider AARP's comments in this matter.

Of all the consumer complaints about telecommunications services encountered by AARP, the most prevalent and the most serious complaints concern early termination fees for service contracts for wireless service. These early termination fees are often exorbitant, running to hundreds of dollars. The Commission may not be able to prevent broadband carriers from offering service under contract terms; however, consumer rights should be spelled out in Commission Truth-in-Billing rules for broadband providers. Further, the rules should require providers to warn consumers in unambiguous terms about the potentially severe impact of these contract provisions.

At a minimum, specific provisions concerning contracts should include:

- Consumers should be able to cancel, without penalty, any contract for broadband service within a period of up to 20 days after the date of the first bill for monthly service following service activation; the consumer should be permitted to return for a full refund any equipment acquired from the broadband provider or its agents or authorized dealers;

- Any fee charged by a broadband service provider to customers for terminating a service contract before its scheduled expiration should be limited to a reasonable level; such a reasonable limit will enhance competition in the broadband services marketplace and promote consumer satisfaction.

- Broadband service providers should be required to disclose early termination provisions in prominent type in the printed contract and should be required to illustrate the impact of the provision with numerical examples, showing the customers how much early termination may cost them. Customer service representatives should be required to walk customers through this language and should be required to obtain a separate consumer signature agreeing to the provision.

AARP is also aware that some providers are marketing broadband service through outbound telemarketing and construing consumers' responses on the sales calls as "oral contracts." The Commission should prohibit such practices by specifying that any contract for broadband service must be in writing and by prohibiting providers from misleading consumers with claims of "oral contracts."

B. Slamming and Cramming

Consumers expect and deserve the same consumer protections respecting anti-consumer practices like slamming and cramming when purchasing broadband services as they enjoy today with narrowband service. We will not recount the myriad abuses that plagued consumers who were contending with local and long distance carriers willing to mislead customers into switching carriers or to commit outright fraud. As a general matter, AARP supports the extension of existing rules regarding these practices to providers of broadband service.

Given the differences in technologies and the arrangement of providers inherent in broadband service, the extension of existing rules will require subtlety and may not allow for a direct transfer of the existing requirements. For example, BellSouth argues that "slamming" of a customer's Internet Access service is not a realistic possibility since changing a customer's ISP requires the customer's active involvement in installing equipment, assigning new passwords, etc.[19]

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[19] Comments of BellSouth at p. 12.

However, even in this case, there is more to the story. In its Comments, BellSouth also recounts that it has been involved in disputes in which a DSL provider alleged that ISPs were attempting to "slam" customers into changing ISPs.[20] In other words, it appears that the attempt was made to slam a customer; it was simply detected and was thwarted by an alert customer. The Comments of Third Party Verification, Inc. (3PV) provides a useful discussion about how the VoIP industry operates today and how providers can potentially slam a customer's choice of VoIP provider.[21]

These anecdotes suggest that it may be useful for the Commission to distinguish between "hardware" and "software" slamming. The fact that physical changes to hardware hookups are needed to change ISPs today may lessen the need for written authorization or third-party verification when changing a customer's ISP, *at the present time*. But it is likely that this arrangement will change in the future so that mere software changes can be used to change the selection of an ISP.

Given these considerations, AARP makes the following recommendations with respect to slamming:

- The Commission should announce the principle that unauthorized switching of a consumer's broadband service is a violation of Commission rules and will subject a provider to penalties. This should apply to all broadband service providers: facilities-based and non-facilities-based.

- The Commission should extend its existing "slamming liability rules" to the provision of <u>all</u> broadband services, including Internet Access Service, VoIP and similar services. This is essential to take any profit motive out of slamming.

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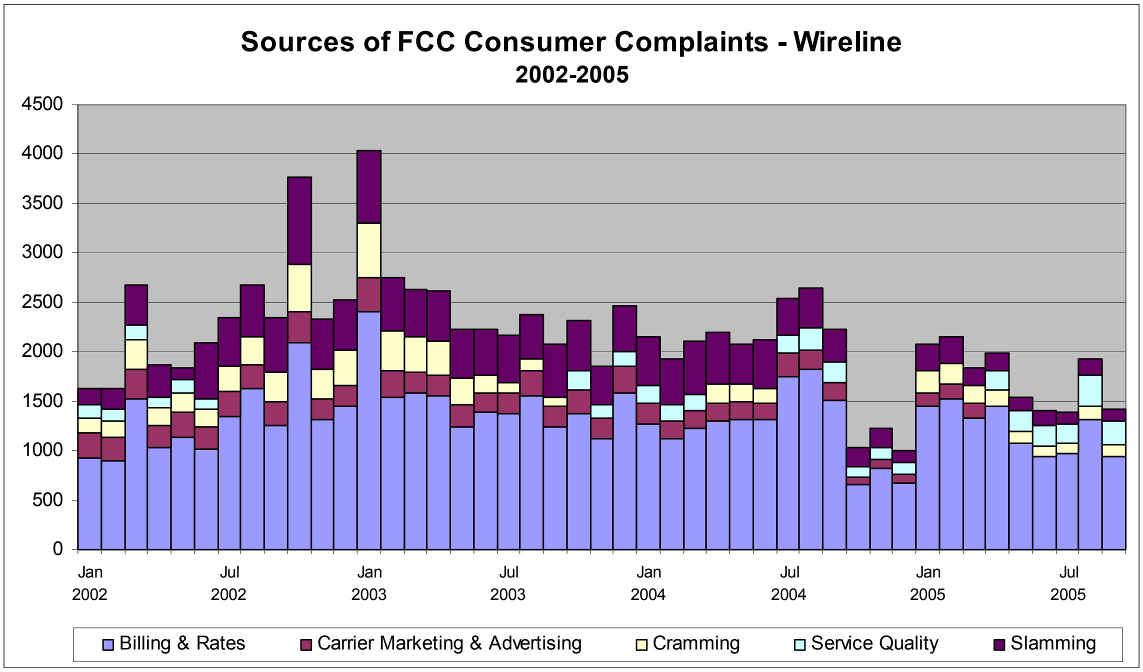
[20] *Id*., p. 13, footnote 26.
[21] Comments of 3PV at pp. 6-8.

- The Commission should require third party verification or written verifiable authorization for changes in a customer's VoIP provider;
- The Commission should develop specific verification requirements for any broadband services that are vulnerable to slamming, similar to the cases of local service and interexchange service;
- The Commission should invite state Commissions to enforce these slamming policies, similar to the current practice for narrowband service.

The ability and incentive of unscrupulous service providers to mislead consumers into purchasing unwanted services (cramming) appears to be the same for broadband services as with Title II telecommunications services. In fact, consumers of broadband services might actually be less prepared to detect the presence of unwanted services in this arena. Consider, for example, the unfamiliar options attached to VoIP service: virtual phone numbers, "soft" phone service and voice mail/email consolidation. For that reason, the Commission should extend the appropriate consumer protections to broadband services.

While the Commission's consumer policies for narrowband communications have been helpful to reduce abuses of consumers' rights, there is still much work to be done. The following chart shows the level of consumer complaints about wireline services for the period 2002-2005 in five categories: Billing and Rates, Carrier Marketing and Advertising, Cramming, Service Quality and Slamming.[22]

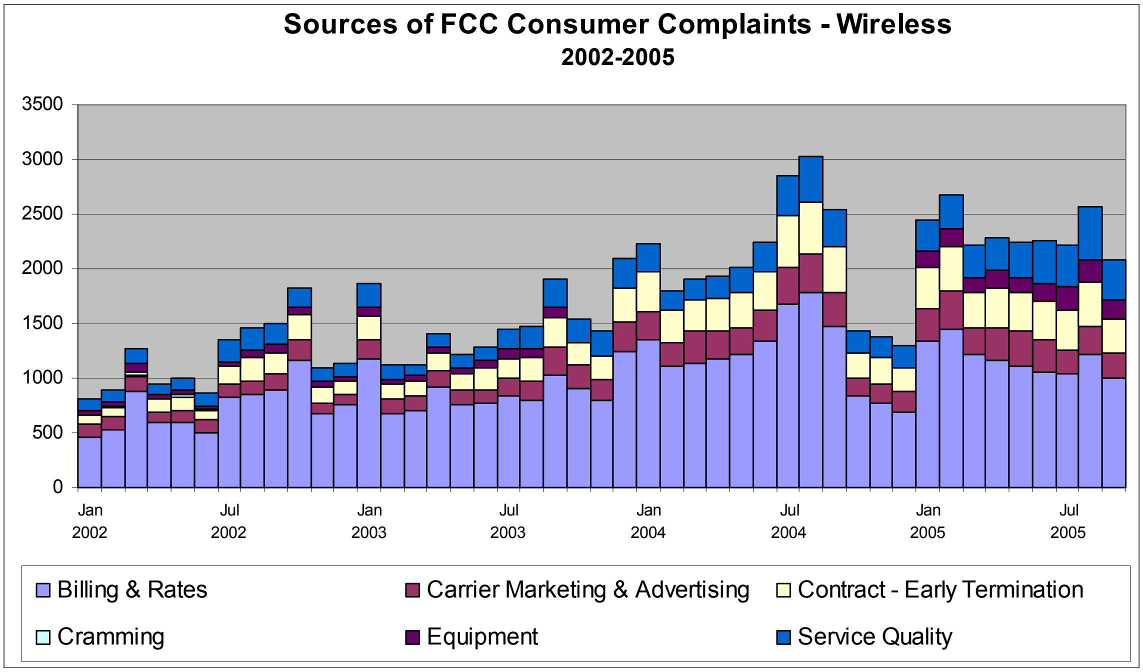
[22] Source: Federal Communications Commission, Quarterly Reports on Informal Consumer Inquiries and Complaints, available at www.fcc.gov/cgb/quarter/. This chart omits complaints from one category: the Telephone Consumer Protection Act. For easier reading, a larger version of the chart is attached to these Reply Comments as Attachment A.



As this chart shows, consumer complaints regarding slamming and carrier marketing and advertising have generally declined over the past three years, while complaints about service quality have generally increased. Complaints about billing and rates initially declined, but have shown little decrease in the last two years.

Similar statistics for wireless service show an overlapping, but different, set of customer concerns. In the next chart, consumer complaints for wireless service are summarized for the period 2002-2005, divided into six categories of complaints: Billing and Rates, Carrier Marketing and Advertising, Contract – Early Termination, Cramming, Equipment, and Service Quality.[23]

[23] Source: *Id*. The chart omits complaints related to one category: Wireless Number Portability. For easier reading, a larger version of the chart is attached to these Reply Comments as Attachment B.



Examination of the second chart reveals that wireless complaints in these six categories have generally risen over the past three years. AARP is particularly concerned about the categories "Contract – Early Termination," and "Service Quality," which have either stayed the same or increased in recent years.

AARP supports the recommendations NASUCA made in its Comments concerning the cramming problem and consumer fraud generally.[24] The Commission should strengthen its rules concerning these deceptive practices and apply the improved rules to services regulated under both Title I and Title II.

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[24] See, e.g., NASUCA Comments at p. 32.

C. Privacy and CPNI

In the course of providing service to customers, broadband providers collect and otherwise obtain substantial sensitive information about their customers and how those customers use broadband service. Here are examples of the information that may be obtained by ISPs, VoIP providers, website hosts and others:

- **Personal, Identity and Credit Information** – Name, address, phone number, fax number, email address, website address, credit card information, credit profile, social security number, passwords, verification information (e.g., mother's maiden name);
- **Network Usage Profile Information** – Physical hardware arrangements, broadband services purchased, aggregate usage statistics, amount spent on broadband service, dynamic or static IP addresses;
- **Content and Usage Information** – Websites visited, files downloaded, content of emails sent and received, voicemail messages, fax images sent or received by email, encrypted transmissions to secure websites; translation tables linking IP addresses and customer identities.

Much of this information is far more sensitive than CPNI collected by common carriers regulated under Title II of the Commission Act. For this reason, the Commission should act promptly to extend the CPNI rules to jurisdictional broadband services and should strengthen those rules in several respects, as discussed below.

In recent testimony before the Committee on Energy and Commerce of the House of Representatives, Chairman Martin explained the connection between the decision of the

10th Circuit Court of Appeals in *US West v. FCC*[25] and the recent abuses stemming from the dissemination of sensitive phone records:

> In August of 1999, the 10th Circuit struck down these rules finding that they violated the First and Fifth Amendments of the Constitution. Required by the 10th Circuit to reverse its "opt-in" rule, the Commission adopted an "opt-out" approach whereby a customer's phone records may be used by carriers, their affiliates, agents, and joint venture partners that provide communications-related services provided that a customer does not expressly withhold consent to such use. This ruling shifted the burden to consumers, requiring them to specifically request that their personal phone record information not be shared. This ruling has resulted in a much broader dissemination of consumer phone records and thereby may have contributed to the proliferation of the unlawful practices of data brokers that we are seeing today.[26]

AARP agrees with Chairman Martin's conjecture that the "opt-out" regime has led to the broader dissemination of phone records. However, AARP disagrees that the Commission cannot overcome the barrier to an opt-in regime erected by the 10th Circuit Court of Appeals without legislation.

The Court remanded the CPNI Order to the Commission after finding that the Commission had failed to fully consider alternatives to the opt-in regime which was then under appeal by US West. The Commission interpreted the 10th Circuit ruling as follows:

> The court concluded that the Commission's determination that an opt-in requirement would best protect a consumer's privacy interests was not narrowly tailored because the Commission had failed to adequately

[25] *U.S. West v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).
[26] "Chairman Kevin J. Martin's Statement before the Committee on Energy and Commerce, U.S. House of Representatives, 'Phone Records for Sale: Why Aren't Phone Records Safe from Pretexting?'", at p. 9, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263577A1.pdf.

> consider an opt-out option. The court stated that an opt-out option should have been more fully investigated as it is inherently less restrictive of speech. Further, the court ruled the Commission did not adequately show that an opt-out strategy would not offer sufficient protection of consumer privacy. <u>In vacating portions of the CPNI Order, the court did not require the Commission to find specifically that the opt-out option was the correct approach. Instead, it found fault with the Commission's "inadequate consideration of the approval mechanism alternatives in light of the First Amendment."</u>[27] (Footnotes omitted; emphasis added)

The 10th Circuit decision does not require the Commission to use an opt-out regime. It merely indicates that the Commission must show regulations restrict no more speech than necessary to serve the asserted state interests.[28]

The public furor over the sale of telephone numbers (including the response of Congress) provides the Commission with a new basis to reconsider the use of the opt-in regime, at least for the most sensitive information. A broadband provider's use or sale of the details of a consumer's Internet usage – the sites visited, the pages viewed, etc. – should not be construed as protected commercial free speech. Neither should a consumer's calling history compiled by a wireless or wireline carrier. Such extremely private information is not needed by these providers to market to their customers; it should not be lumped with less sensitive CPNI such as the type of browser being used, the DSL speed purchased or a customer's line count and whether those lines are equipped with Call Forwarding.

Even if a carrier contends that its use of this extremely sensitive information entails commercial free speech, the 10th Circuit decision does not require the Commission to use

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[27] *Implementation of the Telecommunications Act of 1996*, Clarification Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 01-247 (rel. September 7, 2001) at p. 4.
[28] 182 F.3d at 1239.

an opt-out regime to protect consumer privacy. Therefore, AARP strongly recommends that the Commission find that the opt-in regime is necessary to protect the privacy of CPNI in today's broadband marketplace. If necessary and desirable, AARP suggests that the Commission amend its *Notice* to include this question.

A separate but related issue is the length of time that broadband providers should be permitted to retain such sensitive CPNI as calling patterns, Internet usage and email content. AARP recommends that the Commission limit the time that broadband providers are able to keep this information. Significantly, such a provision already exists in Section 631 of the Communications Act concerning cable companies:

> A cable operator shall destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (d) or pursuant to a court order. [29]

In addition, cable companies must operate under an "opt-in" regime. They are generally precluded from releasing personally identifiable information without "the prior written or electronic consent of the subscriber."[30] In other words, except in limited circumstances (such as a court order), the customer must affirmatively act (opt-in) to allow the cable company to release personally identifiable information. Finally, such information includes the "extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator" and "the nature of any transaction made by

[29] 47 U.S.C. 551 Section 631(e)
[30] *Id.*, Section 631(c)(1)

the subscriber over the cable system of the cable operator."[31] The information to which these cable restrictions apply is exactly analogous to broadband CPNI.

Finally, AARP strongly supports the recommendation of the Public Utilities Commission of Ohio that broadband carriers be required to report promptly to affected consumers any breach in security that results in the release of personally identifiable information.[32] Recent history in other industries shows that accidental release and theft of sensitive consumer information is becoming a serious problem nationally.[33] Organizational responses to such releases have varied widely. The Commission should adopt a uniform requirement applied to broadband service providers, requiring them promptly to notify consumers whenever such a breach occurs.

In summary, AARP offers the following recommendations respecting CPNI for broadband consumers:

- The Commission should use its Title I ancillary authority to immediately extend its existing CPNI rules to broadband Internet access services;

- In view of the evident threat to consumer privacy evidenced by the dissemination and sale of consumer phone calling records, the Commission should reopen its CPNI rules to consider stronger protections, including a requirement for opt-in authorization protecting the most sensitive consumer information held by broadband service providers;[34]

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[31] *Id*., Section 631(c)(2)(C)(ii)
[32] Comments of Public Utilities Commission of Ohio at p. 8.
[33] See, for example, "A Chronology of Data Breaches," at http://www.privacyrights.org, viewed 2/26/06. The Privacy Clearinghouse report details 147 instances of data breaches in the past twelve months, affecting 53 million Americans.
[34] In light of the fraudulent practice of "pretexting," which is currently used to gain access to sensitive records, the Commission must also strengthen requirements on providers' security practices. This should include requirements for identity *verification* of persons seeking to obtain sensitive information.

- The Commission should strengthen its CPNI rules by requiring broadband Internet access providers to destroy sensitive consumer information after it is no longer needed to provide service to the customer;

- The Commission should require broadband service providers to notify consumers promptly if there is a breach of security that results in the release of personally identifiable information.

D. Section 214 Discontinuance

In its *Notice*, the Commission asks for comment on whether it should impose requirements (similar to those in Section 214) to require a provider of Internet access service to obtain Commission approval to discontinue service and to notify customers of its intention to discontinue service.

AARP recommends that a Section 214-like requirement be extended to Internet access providers, at least for the requirement of advance notice to customers of an ISP's proposal to withdraw from the market. AARP agrees with many predictions that Internet-based telephone service will grow rapidly in future years. As consumers become more reliant on VoIP, it will be important that they receive advance notice of an ISP's intention to abandon service. While it seems likely that, in most situations, another ISP will be available to the customer, advance notification of an ISP's intention to exit the market will permit a customer to make any necessary arrangements to continue VoIP service over the customer's broadband Internet connection.

E. Federal and State Involvement

In its *Notice* the Commission asks for comments on how it should coordinate state and federal enforcement efforts in this area. Specifically, the Commission asks whether commenters support NARUC's proposal for a "functional" approach to enforcement.

As noted previously, AARP recommends that the Commission maintain the option of state regulators enforcing the Commission's slamming rules as applied to broadband services. To the extent that this approach has functioned well for the enforcement of slamming rules, it is reasonable to extend the approach to other areas of consumer protection. As consumers migrate from narrowband to broadband services, it makes sense to tap the expertise and resources of state regulators when enforcing these consumer policies.

More generally, AARP endorses the "functional" approach outlined by NARUC in its comments.[35] Under this regime, the FCC would set minimum consumer protection rules in those areas where the Commission has such authority. States would be responsible for enforcement jointly with the Commission. Finally, states would not be preempted from establishing consumer protection rules that go beyond the Commission's minimum rules. On this last point, AARP endorses the comments of NASUCA:

> The Commission should not preclude states from adopting service quality and other consumer protection standards for broadband service providers as they deem necessary. The Commission should recognize that some uses of broadband services may require compliance with various state standards. Preempting states from addressing service quality issues would

[35] Comments of NARUC at pp. 4-6.

> be bad public policy because service quality can be affected by so many "local" factors such as weather and topography. States should be able to establish and enforce the necessary consumer protections, including service quality standards in those instances. This is true particularly as more voice traffic is being carried over the broadband network.[36]

F. Consumer Options for Enforcement

In its *Notice*, the Commission discusses the options consumers have for filing and pursuing complaints against broadband providers for consumer protection violations. AARP appreciates the Commission making available the resources of the Consumer Center representatives to consumers as they attempt to pursue and resolve complaints. In that regard, AARP strongly agrees with the recommendations of NASUCA for making the complaint process fair and useful for consumers. In substantial detail, NASUCA explains fully what must be done to ensure that the playing field is leveled for the consumer who wishes to bring a complaint. NASUCA also explains in detail how the Commission can usefully collect and summarize such complaint data so that it is useful in identifying patterns of complaints.[37]

V. Non-Discriminatory Internet Access

The foregoing comments have dealt with protections to ensure that consumers are treated fairly in their use of a great societal resource, the Internet. But these protections become somewhat hollow if consumer access to the full range of Internet resources is limited or impaired by broadband access providers. For that reason, AARP strongly urges the

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[36] Comments of NASUCA at p. 45.
[37] *Id.*, at pp. 46-53.

Commission to base its broadband policy on a strong foundation: the commitment to an open Internet and to the requirement that all broadband providers enable consumer to make full use of the Internet. In short, AARP endorses the set of policies known as "net neutrality."

The Internet grew up as an untamed, unfiltered, open-access network of networks and, for the most part, it retains that essential character today in the United States.[38] However, there are gathering signs that broadband Internet access providers are restricting uses and the applications that can be used on the Internet. Some broadband providers are beginning to leverage their control to provide preferred access to content that they or an affiliate controls. The Commission is undoubtedly aware of speculation about carriers constructing "tiers" of Internet access – fast lanes and slow lanes.

The motivation for a carrier to leverage its control over access to the Internet is clear: by steering traffic to its own affiliated sites, a provider can profit from paid content and paid advertising in addition to its provision of Internet access. By providing superior access to its affiliated content, a carrier will also weaken or eliminate competitors. By restricting the applications that a subscriber may use (e.g., VoIP), a carrier can limit competitive pressure on other services, positioning itself in the marketplace at the expense of its broadband consumers.

[38] Consider the contrast of the current situation in the People's Republic of China, where search engines like Google, Yahoo! and Microsoft are restricted so that citizens cannot identify or reach Internet sites that contain information deemed unsuitable by the Chinese authorities.

The damage to an Internet user is manifest: the subscriber's choice is limited and the full range of options is not made available to the customer. Simply put, the customer is not getting what was paid for. But beyond the individual subscriber, damage to the Internet is also clear: discriminatory access reduces competition in the marketplace of ideas; discriminatory access robs the Internet of the freedom and openness that are its hallmarks.

As stressed by NASUCA in its Comments, this Commission has long strived to maximize access to, and use of, the public network.[39] In a series of policy decisions and regulatory regimes, the Commission has attempted to prevent carriers from leveraging their position as providers of network access to influence content and applications used on the network. Through most of its history, the FCC's chief concern in this regard was the public switched telephone network – the PSTN. In today's world, another network has arisen that deserves these same Commission efforts: the Internet.

AARP believes that the Commission's policy should endorse an open Internet and reflect the following policy ingredients in its rules and policies dealing with broadband providers:

- All residential consumers should have the ability to choose from among multiple, competing broadband networks;
- All local governments should maintain the right to own, operate, or deploy their own broadband network and services;

[39] *See* Comments of NASUCA at pp. 11-17. These initiatives include the Commission's *Computer Inquiries,* its *Open Network Architecture* regime, the *Carterfone* decision and the *Hush-a-phone* decision, among others.

- Consumers should have the right to use their Internet connections to access, use, send, receive, or offer any lawful content or services of their choosing over the Internet;

- Consumers should be able to use any applications or services made available over the Internet or in connection with access to the Internet;

- Consumers should have the right to attach any device (e.g. Internet phones, gaming consoles, and WiFi routers) to the operator's broadband network as long as that device does not damage or degrade other subscribers' use of the operator's broadband network.

VI. Conclusion

AARP urges the Commission to use its Title I ancillary authority to apply strong consumer protection rules to broadband service providers. By imposing pro-consumer rules now, the Commission can head off some of the problems that have plagued consumers in other telecommunications markets. In the future, broadband will deliver many essential services for mid-life and older Americans; the FCC should help ensure that the reality of that future matches consumers' expectations.

Protecting consumers is not inconsistent with a competitive marketplace; in fact, strong consumer protection rules imposed on all providers in a non-discriminatory fashion will enhance the development of a fully competitive broadband marketplace.

This NPRM offers the Commission the opportunity to improve and strengthen its consumer protection rules, especially in the area of truth-in-billing and privacy:

- The Commission has fielded a huge number of consumer complaints in recent years about incomprehensible and misleading monthly bills, deceptive marketing practices and onerous fees for contract termination. The Commission should apply lessons from narrowband and wireless regulation to broadband service providers, before the abuses and complaints begin to mount.

- New threats to consumer privacy, evidenced by the public furor over sale of sensitive consumer calling information, give the Commission a basis for revisiting its CPNI rules. Privacy protections are especially important in this arena, since the personal information obtained by broadband providers is even more sensitive than CPNI collected by narrowband providers.

Respectfully Submitted,

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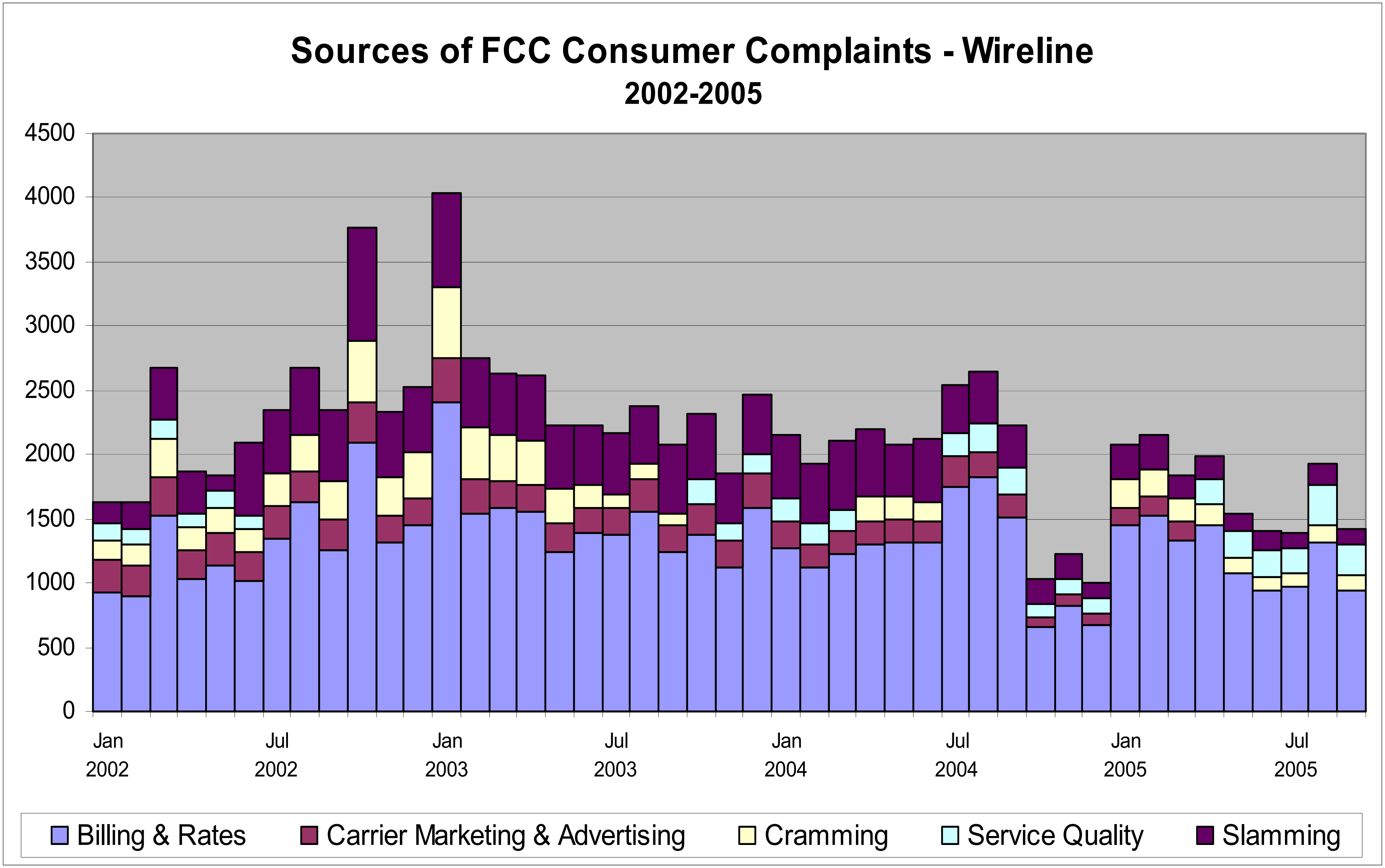
Sources of FCC Consumer Complaints - Wireline
2002-2005
4500
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3000
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2000
1500
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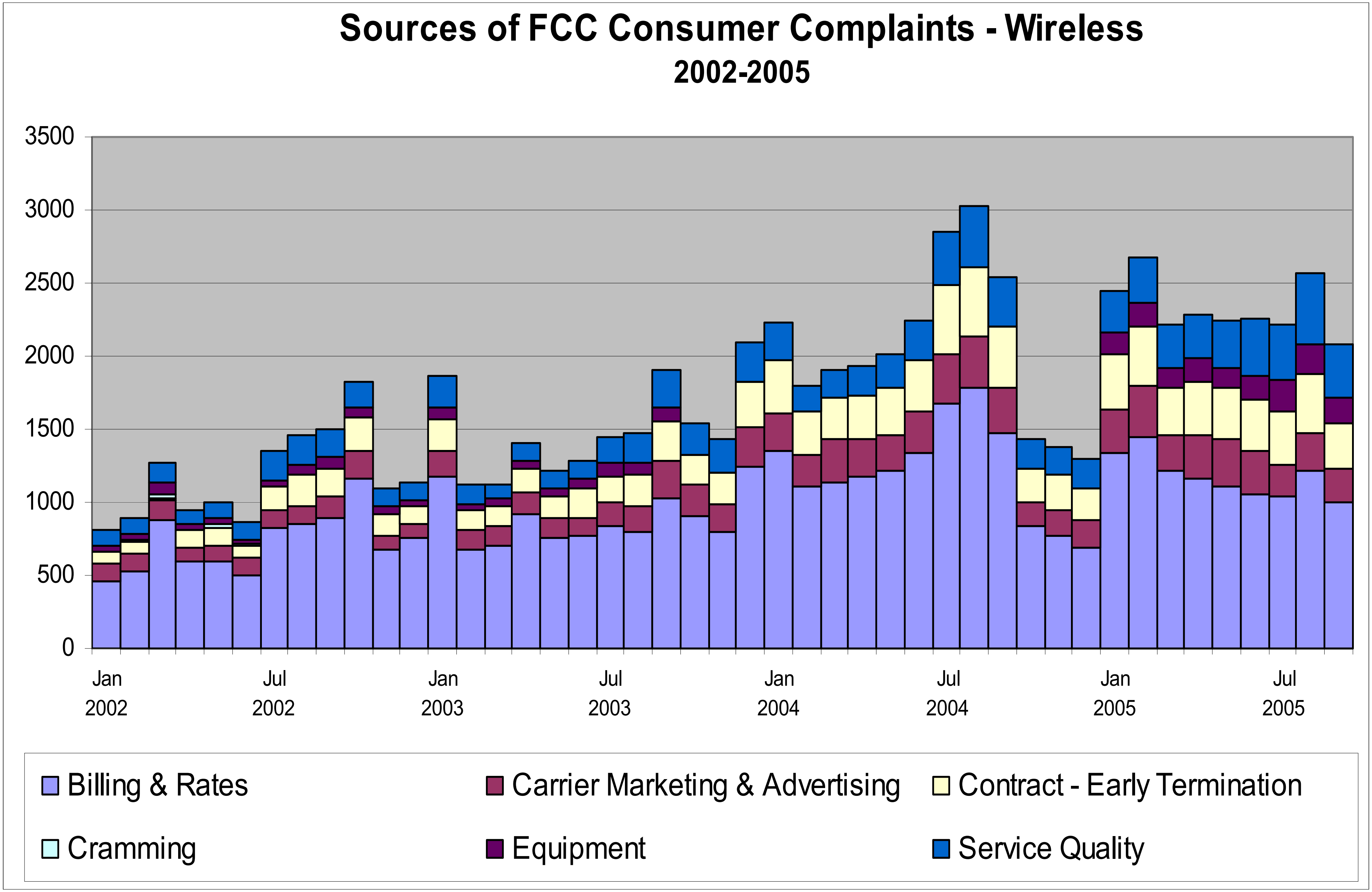
Jan 2002
Jul 2002
Jan 2003
Jul 2003
Jan 2004
Jul 2004
Jan 2005
Jul 2005
Billing & Rates
Carrier Marketing & Advertising
Cramming
Service Quality
Slamming


Sources of FCC Consumer Complaints - Wireless
2002-2005
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Jan 2002
Jul 2002
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Jan 2005
Jul 2005
Billing & Rates
Carrier Marketing & Advertising
Contract - Early Termination
Cramming
Equipment
Service Quality